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Policy Brief

How Should Lebanon Recover Its Stolen Public Assets?

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Executive Summary

The October 2019 protests and the ensuing financial crisis brought on the forefront discussions on the country's endemic corruption, plundered economy, and the decades-long theft of its public assets and funds. Demands such as accountability, fighting corruption, and recovering those stolen assets became popularized and have become protesters' non-negotiable requests. In response, the ruling political elite tried to ride the wave of demonstrations and use these demands as being theirs. They raised appealing slogans such as fighting corruption and bringing back stolen public assets as being their own fights.

An Anti-Money Laundering Law passed in 2015 categorizes cases of illicit enrichment and corruption—such as bribery, influence peddling, embezzlement, and abuse of power—as crimes. They are considered as leading to money laundering by ways of concealing the actual source of illicit funds and providing false justification to them, or by transferring, moving, exchanging, or employing funds. Unlike common knowledge, Lebanon does have mechanisms and laws put in place to fight these crimes.

Recovering looted funds is a long and difficult journey but not an impossible one, as many other countries have done it before. This policy brief aims to shed light on how to prosecute public servants accused of stealing public assets, and how to bring those stolen assets back home. It addresses three levels on this matter: First, it goes into detail on the how to collect the needed data on stolen public assets. Second, it identifies and enumerates the various mechanisms and ways Lebanon could use to prosecute culprits, while differentiating between two types of legal provisions, depending on who is accused of corruption. Third, the brief explains how Lebanon can retrieve stolen assets held outside the country.

Who are public servants?

In order to understand the scope of the laws and mechanisms that aim to retrieve stolen assets, one needs to first understand their targets: Public servants. Indeed, some of the core demands of the October 2019 revolution, such as accountability and fighting corruption, were connected to how public servants used public funds, without any monitoring.

A public servant is defined as any person who is elected or appointed to a public office, including the presidency of the republic, the parliament, ministries, municipal councils or federations, local mayors, notaries, members of administrative committees, if their work entails financial consequences. This is in addition to the state's representatives in companies, individuals in charge of public facilities or companies of public interests, as well as judges—judicial, administrative, financial, and constitutional—and members of every judicial body that is part of the state's institutions.

Lebanon passed an illicit enrichment law in 1999, which defines it as a significant increase in the assets of a public servant, judge, or any associates. And so, the law primarily targets public employees, defined by the law as any employee, contractor—permanent or temporary—in any public institutions, of any rank or grade. This includes those working in ministries or public institutions, or independent administrations, municipalities or unions of municipalities. The law also includes any office or individual in military and security institutions such as customs.

In other words, any person that deals with public affairs or public service can be investigated. There is also the possibility of including in this group contractors profiting from general projects and contracts, as well as those who benefit from public projects or public service concessions that are to be implemented.

Similarly, the 2008 law that allowed Lebanon to join the United Nations Convention against Corruption (UNCAC), and the on the protection of whistle-blowers passed in 2018,[1] have been amended in such a way that the scope of the investigation would include partners and consultants in public projects, even if they were not remunerated.

It has become possible to trace funds abroad with two laws passed in 2015 and 2016, which defined new measures and procedures for the exchange of financial information for tax purposes as per the requirements of the Global Forum for Transparency and Exchange of Information. This allowed the government to exchange information and have access to all financial data on Lebanese tax residents, including those affected by the Illicit Enrichment Law.

1
These are law 33 of 2008, and law 83 of 2018, respectively.

Collecting information and detecting assets

The first step to prepare a robust prosecution case is to collect reliable and accurate data, documents, and evidence on these cases. There are three types of data that can be collected: Public records, banks, and reports.

Those seeking to fight corruption and recover public funds must collect all necessary documents and data on those suspected—whether directly or indirectly—of looting funds. Public records are a good starting point, namely land and registries, as well as records within the Ministry of Finance, and documents from the Traffic, Trucks and Vehicles Management Authority. This is in addition to conducting a deep dive analysis of all available financial data.

Banks hold valuable information when it comes to investigating stolen public assets too. According to the Banking Secrecy Law and the Illicit Enrichment law, banks cannot invoke banking secrecy in a bid to block any investigations conducted by the competent judiciary in cases of illicit enrichment. The Banking Secrecy Law also authorizes the Special Investigation Commission to investigate money laundering cases and crimes mentioned in the Money Laundering and Terrorist Financing Law of 2015.

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While amendments made in June 2020 to the banking secrecy law expanded its scope to include people related or associated to public servants or other influential personalities, it has prevented judicial autho-rity from lifting the secrecy laws. Instead, it has authorized the newly formed national commission for fighting corruption—that has not yet been constituted—to do so.[2,3]

The third type of data that can be collected can be found in oversight bodies' public accounts and reports, such as the Audit Bureau and the Central Inspection. In addition, judicial documents, media reports, and relevant civil society organizations' reports on corruption can come in handy for that purpose.

Identifying and prosecuting suspects

The collected data and evidence lead to uncovering potential illicit enrichment crimes, opening the door to pursuing defendants. There are suspicion of illicit enrichment when for instance the defendant has assets that are not really fit with their lawful income, or when they possess wealth that is disproportional to their actual official resources and declared income.

People suspected of stealing public assets would be referred to the competent judicial authorities as a result of a signed written complaint to the public

2
According to the latest news at the time the brief was written, the President of the Republic has refused to endorse the law and referred it back to the Parliament for revision.

3
In a bid to further fight illicit enrichment and track corruption, there has been a proposal to cancel the last paragraph of Article 103 of the Income Tax Law of 1959, which argued that it did not apply to banks subject to the Banking Secrecy Law. The proposal aimed to amend this article so that every person, bank, financial institution and their branches and representative offices abroad, allow specialized staff from the ministry of finance to access, upon request, to all documents, records, and information that would help determine how much tax each should pay. However, this reform has failed and the proposal rejected by parliamentary commissions.

prosecutor or directly through the first investigating judge in Beirut. This procedure, however, has many obstacles, namely the need to secure a bank warranty of LBP 25,000,000 as a prerequisite to submitting a complaint.

If charges are dropped against the defendant—which is often the case with a biased judiciary system—the person who had filed the complaint could be accused of libel, fined at least LBP 200,000,000, and could even risk a three months to one year prison term. The defendant could also request additional compensation for damages incurred by pressing charges. Due to the big risks incurred by complainants, it is a priority to amend the law to abolish such illogical and unconstructive restraints.

If the complaint does go forward, however, the investigating judge and competent courts can apply the provisions of the Code of Criminal Procedures in the investigation into cases of illicit enrichment. The judge has also the right to immediately order the provisional seizure of the defendant's properties. This can be enforced until an order is issued to either lift it or to turn it into complete seizure. This also entails lifting the banking secrecy on the bank accounts and assets of the people investigated.

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It is possible to undertake precautionary measures of current laws through due diligence procedures, follow-ups, reporting and investigating suspicious activities and operations at home or abroad. This could be done through the special investigation commission that would take the necessary decision concerning funds. The case could also be referred to the public prosecutor at the Court of Cassation and to the head of the Supreme Banking Authority, to have the proper decisions and judgments passed.

The parliament's Administration and Justice Committee proposed amendment to the Illicit Enrichment Law to separate illicit enrichment from related crimes and give a new criminal definition that would be in line with the United Nations Convention against Corruption (UNCAC).

That being said, it is important to define special and appropriate punishments for illicit enrichment in order to categorize it as a felony regardless of any other associated offenses. This would reverse the burden of proof and could facilitate prosecution in case of unexplained wealth. This would also allow the state to confiscate funds resulting from such activities.

Judiciary procedures to pursue perpetrators

There are two kinds of procedures when it comes to prosecuting people accused of having stolen public assets: The normal prosecutions and trials, applicable to all public officials, and the special provisions with relation with presidents and ministers.

Provisions of ordinary law

These cases include individual violations or those that occurred in collaboration with others at the hands of a public servant when it comes to public procurements, tenders, contracts, public works, and the management of funds or public facilities.

The Lebanese state, represented by the public prosecutor, can refer the case to the competent courts when they possess evidence to substantiate any allegations. A lawsuit to recover stolen assets, at home or abroad, can be initiated by the state, which would have the right to obtain the seizure of the defendant's property. This would also help to seek international assistance at a later stage.

The criminal court of appeal in Beirut is the one in charge with cases of illicit enrichment, and rulings can be appealed to the court of cassation. Moreover, the Lebanese penal code provides a time limit on the right to prosecute, but this would be applied starting the date of the discovery of the offense.

If convicted, defendants face three months to three years of imprisonment and a fine that would be at least double the value of what had been taken or accepted illegally. With a conviction, the Lebanese penal code provides the possibility to recover stolen assets by confiscating all objects that resulted from a felony, misdemeanor, or the intention to causing one.[4] The court can also order the confiscation of all objects whose manufacturing, acquisition, sale, or use was unlawful, even if it was not the property of the convicted person. And whenever restitution is possible, a judgment can order it spontaneously, to the benefit of the state.[5,6]

In certain cases, however, it would be easier to prove a civil offense as opposed to a criminal one. In this event, a civil lawsuit could be instituted to recover stolen assets.

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This could be done for cases that involve contracts between the state and defendants, such as a contractor within a public facility. And so, a civil claim may be filed in cases of illicit profit or ownership, which would result in the obligation to return the stolen asset.[7] It would be feasible to recover funds and assets either as compensation for damage or by invoking nullity of the contract.

Special provisions for presidents and ministers

The Lebanese constitution provides several exceptions to the Illicit Enrichment Law, stating that presidents of the republic, prime ministers, and ministers

4
Article 69 of the penal code.

5
Articles 98 and 130.

6
Article 14 of the Anti-Money Laundering Law of 2015 makes the recovery of funds possible: 'The movable or immovable assets that are proven, by a final court ruling, to be related to, or derived from, a money-laundering or terrorist financing offense, shall be confiscated to the benefit of the state, unless the owners of the said assets prove in a court of law their rights to possess them.'

7
This would be following Article 242 of the Code of Obligations and Contracts.

accused of violating the constitution, committing high treason, or breaching their duties would be subjected to public laws during their tenure.

The Supreme Council is in charge of trials. It is made of 15 members—seven MPs chosen by parliament and eight of the highest ranked judges—who meet under the presidency of the judge of the highest rank. Any condemnation by the Supreme Council, issued after an investigation is voted by secret ballot and has to get at least 10 votes out of the 15.

The provisions of trials related to these measures are determined by Law 13 of 1990, which stipulates that in order for any president, prime minister, or minister to be tried, the indictment request must be submitted through a petition signed by at least one fifth of the MPs. The MPs' vote is necessary in order to involve the Supreme Council.

Following the approval to indict, parliament would decide by an absolute majority either to refer the indictment request immediately to the Investigation Commission—a special parliamentary committee—or order its dismissal. At the end of the investigation, the final indictment must be adopted by a majority vote of two third of the members of parliament.

Since the ruling political system is based on sectarian power sharing, made to protect its political elite, it appears almost impossible to prosecute presidents and ministers under the current existing laws in force

If the Supreme Council decides on criminalization, the ruling it issues will be a criminal one which remains bound to public law in terms of the criminal description and the sanctions that can be imposed. There is, however, an exception for the ordinary crimes committed by the president of the republic, which fall within the scope of its jurisdictional competence. This means the judgment issued may request the confiscation, restitution, or compensation of stolen assets. The law remains unclear with respect of cases of violation of the constitution, high treason, or violating the tenure's obligations.

Since the ruling political system is based on sectarian power sharing, made to protect its political elite, it appears almost impossible to prosecute presidents and ministers under the current existing laws in force.

This is why that there have been growing calls since October 2019 to amend the mechanism used to investigate and prosecute politicians and public servants. This prompted the Lebanese Judges Association to request all public persecutors and criminal courts to adopt a jurisprudence of the Public Prosecution of the Court of Cassation passed in 2003, which puts in charge ordinary courts and not the Supreme Council for the trial of president and ministers when it comes to ordinary crimes committed during their time in office.

International asset recovery means and mechanisms

The stage of retrieving stolen assets held outside Lebanon is the most challenging one in this whole matter. It is undoubtedly filled with obstacles, since it involves local and foreign courts and administrative bodies, and it could involve questions of a country's sovereignty.

Therefore, mechanisms put in place have to be clearly and carefully established. For that matter, the UNCAC is a legally binding international anti-corruption instrument that Lebanon signed in 2008. In addition to it, there are other tools available depending on the countries and procedures.

UNCAC establishes asset return as its fundamental principle and allows international cooperation as well as mutual legal assistance on criminal issues related to corruption cases. It involves mechanisms for prosecution, freezing, seizure, and confiscation prior to the recovery of assets. However, the recovery and return of stolen assets located abroad traditionally involves a complex, lengthy, and multi-step process. The state from which the assets were stolen has, as a preliminary step, to provide information on where the assets are held and if they are found, it has to initiate judicial proceedings in the country where they were found. If the state seeking to return those assets wins the case and obtains a final order of confiscation, it will have to secure a second order, usually through a separate judicial proceeding, in the requested state's courts, ordering the assets to be returned. The UNCAC includes significant provisions and details; the most important ones are summarized below:

- Money, real estate, vehicles, and other assets that are acquired through bribery, embezzlement, money laundering, and the abuse of power are considered stolen under UNCAC. Assets are also deemed stolen when a bribe or an abuse of power allows importers and exporters to evade customs duties, and when firms or individuals dodge taxes.
- Financial institutions within the jurisdiction of the member states are required to verify the identity of customers and take steps to determine the identity of owners of funds deposited into high value accounts. In addition, there should be enhanced scrutiny of accounts maintained by or on behalf of individuals (or their family members and close associates) who are, or have been, entrusted with prominent public functions. This would be done at the request of another state or by an initiative by the state where illegally acquired assets and funds are located.

Retrieving stolen assets held outside Lebanon … is undoubtedly filled with obstacles, since it involves local and foreign courts and administrative bodies, and it could involve questions of a country's sovereignty

- Each member state will consider establishing, in accordance with its domestic laws, effective financial disclosure systems for public officials and will provide appropriate sanctions for non-compliance.
- Measures to allow another member state to initiate civil action to establish ownership of property illegally acquired will be taken in accordance with this Convention.
- Competent authorities will be granted the possibility to freeze and/or confiscate property at the request of a court. If there is sufficient ground for taking such actions, the property will eventually be subjected to an order of seizure.
- A state that has received a request from another member of the UNCAC can refer to its competent authorities the order of confiscation issued by a court in the territory of the requesting state.
- In the case of embezzlement of public funds or laundering of ill-gotten funds, confiscated property will be returned to the requesting state.
- Each state will take the necessary legislative and administrative measures in accordance with its domestic law, to ensure the implementation of its obligations under this convention.
- Transfers could be accomplished where appropriate, in line with the voluntary agreements.

To use the UNCAC to retrieve stolen assets, the petitioner has to be a competent authority, even though some countries such as Switzerland and France allowed public intuitions and state-owned enterprises affected by corruption cases to benefit from these measures. In other words, originally, citizens or the organizations representing them cannot initiate legal proceedings through the UNCAC. However, a decision by French courts has recently disregarded this rule and made it possible for anti-corruption institutions to use UNCAC.

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Other international asset recovery means and mechanism

There are various means for international collaborations, other than the UNCAC. International cooperation remains possible either through informal institutional cooperation that may take multiple forms, or officially through a governmental request.

Cooperation can take place through direct communication between relevant

bodies, such as having local public prosecutors contacting their foreign counterparts. This also applies to the Lebanese Special Investigation Authority under the Anti-Money Laundering law and to oversight bodies in general. Such cooperation may also occur between networks of investigators, lawyers, and specialized experts.

Official cooperation though, is established through requesting mutual legal assistance—in writing—based on bilateral or multilateral agreements. This makes it easier for states to accordingly plan and execute the recovery of looted funds. Such cooperation is highly effective as it defines the general framework and adopted strategies, as was the case between Kenya and Switzerland in 2018. In practice, however, states have enormous discretion in whether and when to comply with a mutual legal assistance; for this reason, several asset recovery actions have encountered delays or refusals to provide such assistance.

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Besides, bureaucracy and long processing time are obstacles to this cooperation and lead to losing the element of surprise and putting pressure on relevant parties. This is why prosecutions are often carried out through criminal actions.[8]

8 This was the case for Nigeria and Haiti in relation to former dictators Sani Abacha and Jen-Claude Duvalier.

Precautionary measures for the preservation of funds

Until a resolution between disputing parties is reached and conviction is confirmed, there are measures in place that can allow freezing stolen assets. These measures take many forms: They range from lifting bank secrecy, freezing accounts, to requesting restrictions on transactions. They can be carried out by the competent authority in the countries where looted assets are located.

The most important measure in this regard is freezing assets and funds as adopted at the European level in accordance with the Common Foreign and Security Policy (CFSP), based on the provisions of Article 215 of the Treaty on European Union. According to it, member states have the right to request the freezing of assets and funds in all of the European Union until a resolution of the matter is reached, provided that the request is adopted unanimously by the Council and accompanied by a regulatory resolution governing its execution.

It is important to always take into account the possibility of instigating a civil action to fight corruption and recover funds, since in some cases, it may be easier to prove the civil wrongdoing than to prove a criminal offense

However, this measure is restricted to cases of misappropriation and does

not include money laundering, corruption, or tax evasion. Freezing measures also remain subject to the supervision of the European Court of Justice, which tends to protect the rights of the defense and nullifies many of the taken measures.

Criminal prosecution for corruption

Funds can be recovered faster through the criminal prosecution of perpetrators of all kinds of corruption offenses. In this case, the state waives its immunity. This method allows expediting preventive attachment procedures and sometimes recovery procedures since the burden of proof is transferred to the defendant. In the event the defendant fails to prove real ownership or explain appearances of undue enrichment the funds can be recovered.

Despite the fact that criminal proceedings mainly aim to sanction the perpetrators and deter others from committing crimes, they also allow, in this instance, the recovery of criminal revenues

Civil action

It is equally important to always take into account the possibility of instigating a civil action to fight corruption and recover funds, since in some cases, it may be easier to prove the civil wrongdoing than to prove a criminal offense. Also, the recovery of funds is possible in the form of compensation for damage, or nullity and restoration of the situation to its previous status in the contracts.

Spontaneous initiatives

In the absence of any will or action by the competent authority or the state in which the assets have been illegally acquired, the only effective way is to exert pressure on states and concerned authorities to spontaneously take an initiative. Several examples may be reported in this regard such as:

- The Unexplained Wealth Order in the UK is a court order issued to reveal sources of unexplained wealth. In case convincing proof is not provided, assets are seized after the National Crime Agency makes a successful appeal to the High Court.
- The Magnitsky Human Rights Accountability Act in the United States permits the authorities to impose sanctions on foreign officials accused of human rights abuses and to seize their assets.
- The Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons in Switzerland gives the government the power to unilaterally order the freezing of assets, if four conditions are met: 1) There is a change or imminent change of power in the concerned country; 2) the level of corruption in that country is notoriously high; 3)

there are high chances that assets had been acquired criminally; and 4) Switzerland's interests require freezing actions.

Bilateral agreements

Recovery may occur voluntarily through a settlement, whereby an agreement is reached on how a state will recover the stolen assets through a specific agreement with the accused parties in exchange for a reduced sanction. Several states have resorted to this mechanism—such as Egypt—in cases where the state needed a supply of funds to help it replenish its treasury.

Recovery may occur voluntarily through a settlement, whereby an agreement is reached on how a state will recover the stolen assets through a specific agreement with the accused parties in exchange for a reduced sanction

Urgency for Lebanon to start now

It is evident that the process of recovering Lebanon's stolen assets is filled with numerous obstacles. This is why it is important to start working on the matter now. The first step to get there is to ensure complete independence of the judiciary, given that in its current status it poses as a major stumbling block to any legal accountability. The second step is to amend existing regulations so as to lift confusion, obstacles, and immunities.

The popular uprising of October 2019 pushed the authorities to put forward and expedite the study of new laws, which include a clear and transparent mechanism to retrieve stolen assets, detailing ongoing disclosures, tracking, and auditing processes. Moreover, the Council of Ministers adopted on 12 May 2020 urgent measures aiming to combat corruption and recover stolen assets. Among those is the measure to strengthen and enhance tax control and compliance, notably through the Global Forum framework of exchange of information as well as through the forensic audit of public accounts and contracts.

The third required step to recover stolen assets is to activate international cooperation and seek technical collaboration in this field. In this respect, applying uniform standards, activating assistance, and exchanging expertise require the Lebanese state to take efficient measures in amending its laws and regulations.

A particular attention should be given to the Kleptocrats who have ruled Lebanon with impunity and enriched themselves, their relatives, and collaborators at the expense of their citizens' basic rights. They have full control the judicial circuit and will protect themselves and their collaborators from

prosecution and punishment. Consequently, the UNCAC should be amended to adopt new frameworks, to allow civil society organizations to file for public interest claims.

An international anti-corruption court should be established to prosecute criminal cases when local courts fail to do so. In order to ensure bringing back stolen assets, a framework can also be put forward to find a settlement without resorting to a trial, whereby corrupted officials would voluntarily repatriate and return a substantial portion of the funds and would resign, in exchange of partial or total amnesty.

There is no lack of rules or solutions to reclaim stolen assets, the bigger problem is in the absence of willingness to combat corruption and enforce existing rules. Actions always speak louder than words and policymakers should move forward, and fast, on making the needed amendments to start these procedures to reclaiming the country's looted assets.

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